

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK LAURIA	:	CIVIL ACTION
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER	:	
CORPORATION a/k/a AMTRAK	:	NO. 95-1561

MEMORANDUM AND ORDER

HUTTON, J.

May 21, 1999

Presently before this Court is the Plaintiff's Motion for Protective Order of Third Deposition of Plaintiff (Docket No. 111), the Defendant's Answer thereto and Cross-Motion for Sanctions (Docket No. 112), and Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion (Docket No. 113). For the reasons stated below, Defendant's Motion for Protective Order is **DENIED** and Plaintiff's Cross-Motion for Sanctions is **DENIED**.

I. BACKGROUND

This case involves a cause of action for negligence under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 arising from personal injuries the Plaintiff, Frank Lauria ("Lauria" or "Plaintiff") allegedly sustained while employed by the Defendant, National Railroad Passenger Corporation ("AMTRAK" or "Defendant"). On April 6, 1999, the Plaintiff filed the instant Motion for a Protective Order requesting an Order precluding the third deposition of the Plaintiff. On April 19, 1999, the Defendant filed its Answer and Cross-Motion for Sanctions. The

Plaintiff filed a Response to Defendant's Cross-Motion on April 30, 1999.

II. DISCUSSION

A. Protective Order

In the present motion, the Plaintiff seeks a protective order precluding the Defendant from deposing him for a third time. "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1). The Plaintiff does not dispute that his deposition is allowable under Rule 26(b). Rather, the Plaintiff asserts that it should be precluded under Rule 26 because his third deposition "will result in annoyance, oppression, undue burden, and expense." Although Plaintiff's motion fails to cite the specific authority on which the Plaintiff relies, the Court finds that Rule 26(c) is on point. Fed. R. Civ. P. 26(c). "Rule 26(c) authorizes a court to issue a protective order where justice so requires and upon good cause shown. The party seeking a protective order bears the burden of demonstrating 'good cause' required to support such an order." Trans Pac. Ins. Co. v. Trans-Pac. Ins. Co., 136 F.R.D. 385, 391 (E.D.Pa.1991). To meet its burden, the Plaintiff asserts that there is no basis for Defendant's seeking a third deposition of the [P]laintiff where [D]efendant had a second deposition less than ten weeks prior to the scheduled deposition and where the [P]laintiff was, within the

past month, thoroughly examined and interviewed by [D]efendant's vocational and medical experts." (Pl.'s Mem. at 1.)

The Court finds that the Plaintiff has failed to satisfy his burden of demonstrating good cause. Plaintiff's first deposition was taken on October 30, 1995, well over three years ago. Plaintiff's counsel's behavior at the second deposition of Lauria was obstructive and improper. "The underlying purpose of a deposition is to find out what a witness saw, heard, or did--what the witness thinks." Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D.Pa. 1993). The witness' lawyer is not to act as "an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers." Id. Nor should counsel repeatedly interrupt the deposition to make objections regarding "competency, relevancy, or materiality" since they are preserved for trial. Id. at 528 n. 3. The only proper objections at a deposition are for answers protected by a privilege and to make objections that would be waived if not raised immediately pursuant to Federal Rule of Civil Procedure 32(d)(3)(B). Id. at 528 n. 3.

At Plaintiff's second deposition on January 28, 1999, plaintiff's counsel instructed Plaintiff not to answer any questions relating to anything prior to the date of the first trial of this matter, which occurred in March of 1997. In addition, plaintiff's counsel instructed Plaintiff not to testify to any

fact, which Plaintiff became aware of prior to March of 1997. Plaintiff's counsel did not raise any objection based on privilege. Thus, Plaintiff's failure to provide full and complete responses to all of Defendant's questions on the advice of his counsel during his second deposition, created the need for a third deposition. Accordingly, Plaintiff's motion for a protective order regarding his third deposition is denied.

B. Sanctions

The Defendant seeks sanctions against the Plaintiff pursuant to Federal Rules of Civil Procedure 37(b) and (d). Federal Rule of Civil Procedure 37(b)(2) provides the Court with broad discretion to tailor sanctions for failure to follow a Court Order. Fed. R. Civ. P. 37(b)(2). Under Rule 37(d) of the Federal Rules of Civil Procedure, if a party fails to attend a properly noticed deposition, "[i]n lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d).

The Defendant contends that the Plaintiff failed to obey this Court's Order dated March 10, 1999. More specifically, the Defendant asserts that the Plaintiff failed to appear for a third

deposition scheduled for April 8, 1999, pursuant to the Court's March 10, 1999 Order. Consequently, the Defendant seeks to preclude the Plaintiff "from presenting any evidence at the trial [regarding events that occurred from October 30, 1995, through the present] and by entering judgment by default in favor of defendant and against Plaintiff."

On March 10, 1999, the Court ordered Plaintiff to answer Defendant's questions concerning the time period from October 30, 1995, through the present. The Order, which was based on Defendant's proposed order, did not require Plaintiff to appear at a deposition to answer questions. On the contrary, the Order was responsive to Defendant's motion, which requested an Order compelling Plaintiff to provide complete responses to Defendant's Supplemental Interrogatories. In the present motion, the Defendant does not contend that Plaintiff has failed in this regard. Thus, the Defendant has failed to show how the Plaintiff did not comply with this Court's Order dated March 10, 1999. Accordingly, Defendant's motion for sanctions is denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 21st day of May, 1999, upon consideration of the Plaintiff's Motion for Protective Order of Third Deposition of Plaintiff (Docket No. 111), the Defendant's Answer thereto and Cross-Motion for Sanctions (Docket No. 112), and Plaintiff's Memorandum in Opposition to Defendant's Cross-Motion (Docket No. 113), IT IS HEREBY ORDERED that Defendant's Motion for Protective Order is **DENIED** and Plaintiff's Cross-Motion for Sanctions is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.